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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO AS *AMICUS CURIAE*

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT

Transport Workers Union of America, AFL-CIO ("TWU"), with the written consents of all of the parties, separately filed with the Clerk of the Court, submits this

brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Pan American World Airways, Inc. ("Pan Am") to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 5, 1963 (No. 18,822).

The judgment below affirmed an order of the United States District Court for the District of Nevada denying Pan Am's motion for a preliminary injunction restraining respondent labor organizations and the individual respondents from picketing Pan Am's operations at the Nuclear Rocket Development Station ("NRDS"), Jackass Flats, Nevada. The Court of Appeals, like the District Court, was of the opinion that the injunction would issue if the Railway Labor Act were applicable to Pan Am's employees at NRDS, but held that the Act was not applicable.

This brief will be concerned solely with the applicability of the Railway Labor Act, not with the propriety of the injunction. It is TWU's position that the Railway Labor Act applies to Pan Am's employees at NRDS, as the National Mediation Board ("NMB") recently determined, consistently with its prior determination, affirmed on review, that Pan Am's employees at space installations have common employment interests with its employees at airline installations, so that, as "employees" within the meaning of the Railway Labor Act, they are subject to the statutory dispute-settlement procedures designed to avoid any interruption to interstate and foreign transportation resulting from unsettled disputes between carriers and their employees.

TWU'S INTEREST

In 1950 TWU was certified by the NMB as the sole and exclusive system-wide collective bargaining representative under the Railway Labor Act [45 U. S. C. §§151-188 (1958)] for the craft or class of mechanics and ground service personnel employed by Pan Am. NMB Case No. R-2225 (App. 33a[1]). The certification has continued in full force and effect, and a single, system-wide collective bargaining agreement has also been in continuous effect between Pan Am and TWU, governing the wages, hours and working conditions of all of the employees in the same craft or class.

The 1950 certification was but a reaffirmance of an earlier NMB certification issued to TWU on September 24, 1945, covering the same employees. NMB Case No. R-1451.[2] Thus, continuously since December 18, 1945, Pan Am's mechanics and ground service personnel employed in the continental United States, Alaska, Honolulu, Puerto Rico, Virgin Islands and the Canal Zone have been covered by an agreement with TWU. There have been many modifications, but the agreement has never been terminated. The most recent modifications became effective October 5, 1962.

In 1956 the NMB clarified TWU's certification, determining and ruling that it covered the mechanics and ground service employees in Pan Am's Guided Missile Range Division employed at the Government's guided missile base at Cape Kennedy (formerly Cape Canaveral), Florida, where, under contract with the United States Air Force

[1] The "App." references are all to Appendix A of the Petition.

[2] This certification is referred to in the record (R. 194).

since about March 1954, Pan Am performs technical and base maintenance services. NMB File Nos. C-2202, C-2505 (App. 23a, 32a). The National Labor Relations Board ("NLRB") acquiesced in that assertion of jurisdiction. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956). The "asserted jurisdiction" was judicially approved as "not only lawful but compulsive" under the Railway Labor Act in *Biswanger* v. *Boyd*, 32 CCH Lab. Cas. ¶70,840, 40 L. R. R. M. 2267 (D. D. C. 1957)—a proceeding in which TWU participated as intervenor.[3]

Pan Am has since recognized TWU as the bargaining representative of its employees covered by the NMB certification wherever employed throughout the United States, whether at airline or space installations, including the Electronic Environmental Test Facility at Fort Huachuca, Arizona (since March 1960), as well as at NRDS (since June 1963). At these installations, as at Cape Kennedy, Pan Am performs technical and base maintenance services under contract with a Government agency—the United States Army, at the Arizona facility, and at NRDS, the Atomic Energy Commission ("AEC"), which, with the National Aeronautics and Space Administration, created the Space Nuclear Propulsion Office—Nevada Extension to manage NRDS, a facility devoted to the research and development of nuclear rocket engines and vehicles for interplanetary travel.

After Pan Am entered into its contract with the AEC for services at NRDS, certain of respondent unions peti-

[3] The background facts of these administrative and judicial rulings are set forth in the Petition (pp. 5-7).

tioned the NLRB for certification as the collective bargaining representative of employees included in the craft or class covered by TWU's certification. The NMB thereupon informed the NLRB and all interested parties that it viewed the controversy as one requiring it to clarify its certification and held a hearing on August 20 and 21, 1963, confined to the question of jurisdiction. On October 29, 1963, the NMB determined that Pan Am and its mechanics and ground service employees at NRDS are, respectively, a "carrier" and "employees" within the meaning of the Railway Labor Act and that the NMB, not the NLRB, has jurisdiction over them. NMB File No. C-3367 (App. 40a).

This NMB determination was not directly reviewed by the Court of Appeals, nor by any court; and, of course, the Court of Appeals did not directly review the prior NMB determinations. The NMB determinations, therefore, remain in effect. However, TWU, having participated in the proceedings leading to the prior administrative and judicial determinations, is obviously interested in making its views known to this Court in the consideration of whether or not to grant certiorari to review a decision which conflicts with those determinations and which, after seven years of certainty thereunder, creates uncertainty in the application of TWU's and the petitioner's system-wide collective bargaining agreement to space installations, where petitioner performs services under contracts with the Air Force, Army and AEC.

ARGUMENT

1. The Decision of the Court of Appeals That the Railway Labor Act Does Not Apply to Pan Am and Pan Am's Employees at NRDS Conflicts Directly With Prior Decisions of the NMB and Thereby Creates Confusion and Uncertainty With Respect to the Administration of the Act and the Application of Collective Bargaining Agreements Under the Act; Therefore, the Writ Should Be Granted.

The NMB ruling in 1956, that Pan Am's mechanics and ground service employees at Cape Kennedy were within the coverage of the Railway Labor Act and the jurisdiction of the NMB, was accepted by the NLRB and approved by the District Court for the District of Columbia on direct review, as already noted (p. 4). No further appeal was taken, and that ruling, unchallenged prior to the decision of the District Court of Nevada in this case, has become an accepted aspect of the NMB's administration of the Act. *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957* 7 (1958).

Even after the decision of the District Court of Nevada, the NMB reaffirmed its construction and application of the Act on October 29, 1963, as noted previously (p. 5), ruling that Pan Am's employees at NRDS are likewise subject to the Act. The Court of Appeals was advised of that determination after its opinion had been written, but expressly adhered to its opinion, noting that the NMB had relied on its Cape Kennedy ruling, which the Court said "does not seem persuasive" (App. 12a, 15a).

Although the Court of Appeals did not directly review the NMB decisions affecting Cape Kennedy or even NRDS, there is more than an inconsistency in dicta or in general principles between the Court's and the NMB's decisions—there is a direct and conscious conflict on the same matters of fact and law.

The conflict is hardly academic. Confusion and uncertainty with respect to the administration of the Railway Labor Act and the application of collective bargaining agreements under that Act are among the consequences of this conflict. Thus, within a month after the Court of Appeals handed down its decision, respondent Building & Construction Trades Council filed a representation petition with the NLRB with respect to other Pan Am employees at NRDS covered by TWU's certification from the NMB, just as certain other respondent unions had done in July 1963, thereby precipitating the hearing before the NMB on the question of jurisdiction and the determination by the NMB on October 29, 1963.

TWU's position that its system-wide certification and contract under the Railway Labor Act cover such accretions to Pan Am's operations, is not unique. The International Brotherhood of Teamsters (Local 631 of which is one of the respondents) and the Brotherhood of Railway and Steamship Clerks also hold NMB system-wide certifications and Pan Am system-wide contracts which have been applied to Pan Am's Guided Missile Range Division.

If for no other reason, the writ should be granted to settle the confusion and uncertainty created by the conflict between the decision of the Court of Appeals on the applica-

bility of the Railway Labor Act and the prior determinations of the NMB, the agency charged with the administration of that Act. *Cf. United States* v. *Ruzicka*, 329 U. S. 287, 288, 295 (1946); *Rothiensis* v. *Electric Storage Battery Co.*, 329 U. S. 296, 299 (1946).

2. The Court of Appeals, in Holding That Pan Am and Pan Am's Employees at NRDS Are Not Subject to the Railway Labor Act, Improperly Failed to Give Any Weight to the Prior Interpretation and Factual Determinations by the NMB and Incorrectly Decided a Question of Federal Law Important to Labor Peace in the Air Transportation Industry; Therefore, the Writ Should Be Granted.

In holding that the Railway Labor Act does not apply to Pan Am and its employees at NRDS, the Court of Appeals made the following statement:

> "In our instant case, Pan American's operation at the Nuclear Research [*sic*] Development Station where the labor troubles with which we are concerned occurred, had nothing to do with transportation by air or by rail. . . ." (App. 6a)

From this summary statement, it is altogether apparent that the Court of Appeals gave no weight to the NMB's interpretation of the Railway Labor Act, although an administrative agency's interpretation of its governing statute is entitled to "great weight." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549 (1940); *California Co.* v. *Udall*, 296 F. 2d 384, 388 (D. C. Cir. 1961); *West Texas Util. Co.* v. *NLRB*, 184 F. 2d 233, 235 (D. C. Cir. 1950), *cert. denied*, 341 U. S. 939 (1951).

The Court of Appeals also stated summarily:

> "... We do not have here a problem of determining whether the relationship of these employees to transportation is 'tenuous,' 'remote' or 'negligible.' In our case the relationship is non-existent. ..." (App. 10a; footnote omitted).

Thus, it is also apparent that the Court of Appeals gave no weight to the prior and contrary determinations of the NMB, reached after hearings and upon briefs, that the relationship between Pan Am's activities at space installations and its activities at airline installations is not so "remote" or "tenuous"—that the former activities are "part and parcel of Pan American" (App. 31a, 38a). Yet, such *factual* determinations by an administrative agency are probably not subject to judicial review. *Cf. Switchmen's Union* v. *NMB*, 320 U. S. 297 (1943), and cases decided therewith. In any event, judicial review would be limited to the narrow question whether the findings are supported by substantial evidence on the whole record, even if the findings "be considered more legal than factual in nature." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 508 (1951); *cf. Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 478 (1947).

The Court's decision has the anomalous result that Pan Am's employees at space installations and its employees at airline installations, although they have similar skills and do similar work, will be subject to different labor laws. Moreover, the Court's decision has the crucial consequence that unsettled labor disputes at Pan Am's space installations will not be subject to the dispute-settlement procedures of the Railway Labor Act and will, therefore, threaten interruption to operations at Pan Am's airline installations.

The Court of Appeals Misconceived the NMB's Interpretation of the Act

A major rationale for the NMB's reading of the Railway Labor Act is that the withdrawal of any segment of an air carrier's operations from the coverage of the Railway Labor Act is deleterious not only to the segment of the operation denied coverage, but also to the over-all operation, for no segment is insulated from another, from the standpoint of labor relations. The NMB reasoned realistically that a labor dispute at Cape Kennedy, or at NRDS, could easily proliferate so as to threaten interruption to the transportation operations of Pan Am, and that if the Railway Labor Act were not applicable, the dispute-settlement procedures prescribed by that Act would not be available;

> "... If picket lines were then to be established, it is reasonable to suppose that the main offices and air bases would be picketed. What effect would such picketing have upon the functioning of Pan American World Airways as a common carrier of persons or property?" (App. 30a[4])

The Court's reaction, admittedly "hypothetical" (App. 9a), was as follows:

> "It would seem, then, that the same problem of interpretation and application of the pertinent statutes would be presented, if Pan American's management had acquired and were operating a shoe factory for profit. Would the employees in that factory be obliged to comply with the waiting periods and mediation provisions of the Railway Labor Act before they would be free to do what the employees in a

[4] These and the other compelling observations of the NMB are excerpted in the Petition (pp. 14-16).

clothing factory across the street from them were guaranteed the right to do, viz. to strike if they were not bound by contract not to strike?

> "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving. If the Act has the effect of keeping employees in a shoe factory working against their will, it would seem that the effect of the Act is not coincident with its purpose. . . ." (App. 6a-7a)

It is evident the Court of Appeals misconceived the NMB's interpretation, for even "if the Act has the effect of keeping employees in a shoe factory working against their will," the effect of the Act would nevertheless be "coincident with its purpose" if at the same time interstate transportation were kept moving. The Court of Appeals seems to be of the opinion that employees covered by the amended National Labor Relations Act [29 U. S. C. §§151-168 (1958)] invariably enjoy greater advantages than those covered by the Railway Labor Act. It is TWU's opinion only that the Acts are different and that neither Act is perfect.

There can be no question that the function of the NMB under the Railway Labor Act, unlike that of the NLRB under the National Labor Relations Act, goes further than promoting and protecting employees' representation rights. Under the Railway Labor Act, in the event of a dispute between a carrier and a union concerning rates of pay, rules and working conditions which the parties cannot settle, they "are required to submit to the successive procedures designed to induce agreement," lest the dispute interrupt interstate transportation. *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711, 725 (1945). It was for the very purpose of

extending these procedures to air carriers and their employees that they were withdrawn from the coverage of the National Labor Relations Act, *which was originally applicable to them*, and brought within the terms of the Railway Labor Act.

The advisability of this extension was discussed at hearings held on May 20 and June 4, 1935, before a subcommittee of the Senate Committee on Interstate Commerce. The need for the extension was specifically questioned in view of the protection afforded by the National Labor Relations Act, but the desirability of the additional facilities of mediation, arbitration, and emergency board fact-finding was stressed. Hearings before Subcommittee of Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 6, 8-9, 25-27 (1935). The Senate and House Reports are in accord. S. Rep. No. 895, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 2243, 74th Cong., 2d Sess. (1936).

Section 206 of Title II of the Railway Labor Act [45 U. S. C. §186 (1958)] provided, therefore:

> "*All* cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving *any* dispute arising from *any* cause between *any* common carrier by air engaged in interstate or foreign commerce . . . and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. . . ." (Emphasis added)

The National Labor Relations Act is equally unqualified in its exclusion of air carriers from its coverage. Section 2(2) excludes "*any* person subject to the Railway Labor Act" from the definition of "employer," and Section 2(3)

excludes "*any* individual employed by an employer subject to the Railway Labor Act" from the definition of "employee." (Emphasis added.) 29 U. S. C. §152 (2) (3) (1958). It is significant that both exclusions are stated in terms of the employer's, not the employee's, identity.

The language of these Acts could not be clearer. There is no room for interpolating into such language any qualification in terms of the relationship of the employees' particular activity to the carrier's over-all activity.

In reaching its contrary conclusion, the Court of Appeals put some reliance on *California* v. *Taylor*, 353 U. S. 553 (1957).[5] Yet, this Court held unanimously in that case that the Railway Labor Act applied to a state-owned rail carrier, although it was argued "that the Act was inapplicable . . . because a federal statute is presumed not to restrict a constituent sovereign State unless it expressly so provides." *Id.* at 562. In so holding, this Court stressed "[t]he fact that Congress chose to phrase the coverage of the Act in all-embracing terms" and the fact that "Congress . . . has provided, by the Railway Labor Act, [dispute-settlement] techniques peculiar to that industry," a "primary purpose of this machinery" being, as set forth in the Act, "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." *Id.* at 564, 566. These are the very facts TWU stressed, and the NMB relied on, in the Cape Kennedy and NRDS cases.

Thus, as this Court recognized in *California* v. *Taylor*, *supra*, legislative history supports an extensive, not a re-

[5] The Court of Appeals relied principally on *Jackson* v. *Northwest Airlines, Inc.*, 70 F. Supp. 501 (D. Minn. 1947), *aff'd in part and rev'd in part*, 185 F. 2d 74 (8th Cir. 1950), *cert. denied*, 342 U. S. 812 (1951), discussed in the Petition (pp. 21-22).

strictive, coverage of the Railway Labor Act, in the interest of uninterrupted interstate transportation. The NMB's interpretation likewise recognizes that among the intended beneficiaries of this Act of Congress are not only the parties, but also the public.

The Court of Appeals Disregarded the NMB's Factual Determinations

The NMB did not rest with a literal reading of the Railway Labor Act, in implementation of the policy of the Act. The literal application of the Act was only the NMB's logical point of departure.[6] It then proceeded to make factual determinations supporting the community of interest shared by Pan Am's airline installation and space installation employees. The Court of Appeals, in its concern for hypothetical shoe factory employees, gave no weight to the NMB's determinations concerning actual NRDS and Cape Kennedy employees.[6]

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[6] The Court of Appeals assumed (1) that the actual NRDS employees and the hypothetical shoe factory employees are equivalent and (2) that the Railway Labor Act would never apply to the latter. The Court relied, *inter alia*, on the definition of "carrier" in the Act, which includes any company controlled by a carrier if that company engages in transportation or related services. 45 U. S. C. §151 First (1958). Obviously by this provision Congress intended only to *extend*, not restrict, application of the Act and thereby prevent its circumvention. If a subsidiary of Pan Am were organized to engage exclusively in shoe manufacturing, presumably, like any other shoe manufacturing corporation, it would not be subject to the Act. Pan Am itself has yet to go into the shoe manufacturing business, and the NMB has yet to rule that the Act is applicable to shoe manufacturing engaged in by any other "carrier." However, should the NMB ever do so, in literal application of the Act *and* upon factual determinations of the kind made with respect to space installations, it would seem that "the remedy," if a remedy is indicated, "is legislative." *Cf. Baltimore & O. R. R.* v. *Kepner*, 314 U. S. 44, 54 (1941).

It has been the NMB's consistent conclusion, based on common employment interests—the history of bargaining; the nature of the employees' skills, duties and working conditions; and the organization and management of the employer's operations—that the whole of Pan Am's present system should be treated as a unit for labor relations purposes. That conclusion, first reached in 1956 and recently reaffirmed, constitutes an exercise of expert discretion for which both the NMB and NLRB, within their respective spheres, were created.

If that conclusion is incorrect, then the NMB could not act with respect to NRDS and Cape Kennedy, and the NLRB could not act *except* with respect to NRDS and Cape Kennedy. To divide Pan Am in this way between the NMB and NLRB would have the result that neither agency could cope effectively with the carrier's employee relations problems. It would have the further result that employees of the same employer, having the same or similar skills and doing the same or similar work, would enjoy different rights and be subject to different restrictions in their relations with management. Such a result can only invite instability in labor relations.

To review and correct this decision of the Court of Appeals on a question of federal law important to the parties and the public alike, the writ should be granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, New York,
January 13, 1964.

Respectfully submitted,

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